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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

NO. 76-6829

TAYLOR HANCOCK, JR., Petitioner

v.

STATE OF OHIO, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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Counsel for Petitioner

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Subsequent to petitioner's filing of his Petition for Certiorari in May, 1977, counsel for petitioner discovered that the transcript of the mitigation hearing, at which the trial court considered evidence concerning the existence of mitigating circumstances, had never been transcribed and made a part of the record for purposes of appeal. Therefore, the Franklin County Court of Appeals and the Ohio Supreme Court, which found petitioner's death sentence to be constitutionally valid, never had before them and, thus, never reviewed the record of the mitigation hearing.

Upon such discovery, petitioner ordered said transcript and after reviewing it feels compelled to bring to this court's attention the fact that the trial court, at his mitigation hearing, placed upon petitioner the burden of proving the existence of mitigating circumstances under Ohio Revised Code Section 2929.04(B) by a preponderance of the evidence, which clearly makes his death sentence constitutionally invalid under the holdings of this Court and a very recent decision of the Ohio Supreme Court.

Petitioner argued in his Petition For Certiorari that the Ohio death penalty statutes are invalid because they unconstitutionally shift

to defendants the burden to prove the existence of mitigating factors by a preponderance of the evidence. (Petition, p. 38). As previously stated, a review of the transcript of the mitigation hearing clearly indicates that the trial court, in fact, placed upon defendant the burden of establishing one of the mitigating circumstances under Ohio Revised Code Section 2929.04(B) by a preponderance of the evidence:

"THE COURT: The Court at this time would not attempt to review the entire evidence which went to the Jury, and which was argued to the Jury by counsel. The Court is now at the point where the Defendant was found guilty on two counts of aggravated murder. And the only purpose of this hearing today was something required by law under the statutes. And it places upon the Court the duty of determining whether certain factual questions exist. And Section (B) of 2929.04 states that regardless of whether one or more of the aggravating circumstances listed in Division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character and condition of the offender, one or more of the following is established by a preponderance of the evidence. The Court then must interpret the next three subdivisions of Section (B). Subdivision (1) is, did he establish by a preponderance of the evidence that the victim of the offense induced or facilitated it. There is a lack of showing by the Defendant by a preponderance of the evidence that the victim of the offense, or either of them, induced or facilitated the offense.

As to (2), the next burden upon the Defendant is to establish by a preponderance of the evidence that it is unlikely that the offense would have been committed, but for the fact that the Defendant was under duress, coercion or strong provocation. There is a lack of sufficient evidence to establish by a preponderance of the evidence that question.

So, that leaves the next question and that was, did the Defendant show by a preponderance of the evidence that the offense was primarily the product of the offender's psychosis or mental deficiency. And that has been the subject of the evidence here today and the Court has carefully noted what each one of the witnesses said. And the Court has, also, noted the conclusion of Dr. Vermuelen and his evaluation of the subject, Taylor Hancock, and as he said, there is no evidence that Taylor has ever been psychotic or that he is mentally deficient.

Based upon all of the evidence, the Court comes to the conclusion that the evidence was not sufficient to preclude the death penalty.

It is a serious matter, and the Court has taken it seriously since the day the trial began. The Court does take this seriously. However, based upon what has been presented to the Court, the Court concludes that the grounds for avoiding the death penalty have not been established and that it is the duty of the Court to pronounce sentence under the Constitution and the law of Ohio.

Does the Defendant have anything further to say at this time -- is there anything he wishes to say before the Court pronounces sentence?" (Mitigation Hearing Transcript, p. 47, 48, 49).

Such action by the trial court factually confirms and supports the above described arguments petitioner originally made in his Petition for Certiorari as to why his death sentence is constitutionally invalid. (Petition, p. 38). In addition, such improper action by the trial court is contrary to a very recent decision of the Ohio Supreme Court on this issue. On December 28, 1977, the Supreme Court of Ohio reversed a defendant's death sentence because the trial judge improperly placed on the defendant the burden of proving one of the mitigating circumstances. State v. Toth, 52 Ohio St. 2d 206 (1977). Thus, even under Ohio Supreme Court standards, petitioner's death sentence is invalid.

However, this issue, unfortunately, was not considered by the Franklin County Court of Appeals and the Ohio Supreme Court because the transcript of the mitigation hearing was not a part of the record on appeal. Nevertheless, petitioner submits that the Court should consider this issue since, in addition to the above, he argued in his Petition For Certiorari that appellate review of death sentences in Ohio is inadequate under Eighth Amendment standards. (Petition, p. 39, 40, 41). Indeed, the absence of the transcript of the mitigation hearing from the record on appeal totally deprived petitioner of any appellate review of his death sentence; and furthermore, the affirmation of his sentence by the Ohio Supreme Court without reviewing said transcript is directly contrary to what the Court said it will do in reviewing death sentences in State v. Bayless, 48 Ohio St. 2d 73 (1976), at 86:

"In addition, this court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases,

independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges."

See also, State v. Miller, 49 Ohio St. 2d 198, at 204 (1977).

That the Ohio Supreme Court did not follow its own mandate in petitioner's case goes without saying.

For the foregoing reasons, petitioner submits that the affirmation of his death sentence by the Ohio appellate courts was constitutionally invalid and requests this court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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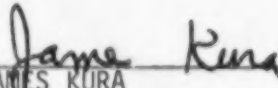
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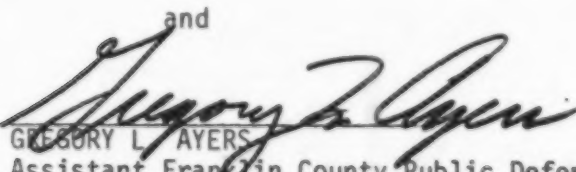
January 13, 1978

Counsel For Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was personally delivered to the Office of the Prosecutor, Franklin County Hall of Justice, Columbus, Ohio 43215, this 13th day of January, 1978 in compliance with Rule 33(1) of the Rules of the U. S. Supreme Court. I further certify that all parties required to be served have been served.


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